85-1669

Supreme Court, U.S.
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No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

MARGUERITE FINDLAY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTION PRESENTED

Whether the petitioner's federal constitutional right to due process of law was violated by a state trial court's jury instructions which (1) defined a "reasonable doubt," inter alia, as a "doubt for which a valid reason can be assigned"; and (2) expressly told the jurors that in order to acquit the petitioner, they would have to be able to "reconcile" or "explain" all the established facts and circumstances on a theory consistent with innocence; but that in order to convict, they need only find "certain facts to be proven," and if the only reasonable inference to be drawn from the existence of "those" facts was guilt, such a verdict should be returned?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. The Evidence	3
B. The "Reasonable Doubt" Instructions	7
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	17
APPENDIX	1A

TABLE OF AUTHORITIES

Cases: **Page(s)**

Adams v. South Carolina, 464 U.S. 1023, 104 S.Ct. 558, 78 L.Ed. 730 (1983) 11, 12, 16

Baker v. State, 477 So.2d 496 (Ala. Crim. App. 1985) 14

Barber v. Scully, 557 F.Supp. 1292, (S.D.N.Y. 1983), aff'd, 731 F.2d 1073 (2nd Cir. 1984) 14

Butler v. South Carolina, 459 U.S. 932, 103 S.Ct. 242, 74 L.Ed.2d 191 (1982) 11, 12

Commonwealth v. Costello, 392 Mass. 393, 467 N.E.2d 811 (1984) 14

Commonwealth v. Lanoue, 392 Mass. 583, 467 N.E.2d 159 (1984) 14

Commonwealth v. Robinson, 382 Mass. 189, 415 N.E.2d 805 (1981) 12

Dunbar v. United States, 156 U.S. 185, 15 S.Ct. 325, 39 L.Ed. 390 (1895) 15

Dunn v. Perrin, 570 F.2d 21 (1st Cir.), cert. denied, 437 U.S. 910, 98 S.Ct. 3102, 57 L.Ed.2d 1141 (1978) 12, 14, 15

Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954) 15

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 15

Isaaks v. State, 337 So.2d 928 (Miss. 1976) 13

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Miles v. United States, 103 U.S. 304, 26 L.Ed. 481 (1880) 15

Murphy v. Holland, 776 F.2d 470 (4th Cir. 1985) . . . 14, 15

People v. LaRosa, 492 N.Y.S.2d 633 (A.D. 1985) 13

Pettine v. Territory of New Mexico, 201 F.489 (8th Cir. 1912) 11, 12, 16

Robinson v. Callahan, 694 F.2d 6 (1st Cir. 1982) 14

Simmons v. State, 206 Miss. 535, 40 So.2d 289 (1949) 13

Smith v. Bordenkircher, 718 F.2d 1273 (4th Cir. 1983), cert. denied, 466 U.S. 976, 104 S.Ct. 2355, 80 L.Ed.2d 828 (1984) 14

State v. Adams, 279 S.C. 228, 306 S.E.2d 208 (1983) 12

State v. Boswell, 294 S.E.2d 287 (W.Va. 1982) 13

State v. Derrico, 181 Conn. 151, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S.Ct. 789, 66 L.Ed. 607 (1980) 10, 12

State v. Evans, 165 Conn. 61, 327 A.2d 576 (1973) 10

State v. Findlay, 198 Conn. 328, 502 A.2d 921 (1986) 1, 3, 6, 10

State v. Keffer, 281 S.E.2d 495 (W.Va. 1981) 13, 16

TABLE OF AUTHORITIES (continued)

Cases: **Page(s)**

Tsoumas et al. v. New Hampshire, 611 F.2d 412 (1st Cir. 1980) 14

United States v. Davis, 328 F.2d 864 (2nd Cir. 1964) 14

Young v. State, 373 P.2d 273 (Okla. Crim. App. 1962), cert. denied, 371 U.S. 957, 83 S.Ct. 513, 9 L.Ed.2d 504 (1963) 13

Constitutional Provisions:

Fifth Amendment to the Constitution of the United States 2

Fourteenth Amendment to the Constitution of the United States 2

Statutory Provisions and Rules:

Connecticut General Stat. § 53a-8 . . . . . 2, 3

Connecticut General Stat. § 53a-134(a)(4) 2, 3

28 U.S.C. § 1257(3) 2

United States Supreme Court Rule 17.1 12

No.

In The

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OCTOBER TERM, 1985

MARGUERITE FINDLAY,
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v.

STATE OF CONNECTICUT,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, Marguerite Findlay, respectfully prays that a writ of certiorari issue to review the judgments and opinion of the Supreme Court of the State of Connecticut, rendered on January 14, 1986, and February 10, 1986.

OPINIONS BELOW

The opinion of the Supreme Court of Connecticut on petitioner's direct appeal is officially reported at 198 Conn. 328. The opinion is unofficially reported at 502 A.2d 921, and is reprinted in the Appendix to this petition, at pp. 1A–21A.

The petitioner's motion to reargue (reprinted in the Appendix at pp. 22A–27A) was denied by the Supreme Court of Connecticut without opinion. The order of the Supreme Court of Connecticut denying petitioner's motion to reargue, dated February 10, 1986, is reprinted in the Appendix at p. 28A.

JURISDICTION

The judgment of the Supreme Court of Connecticut was entered on January 14, 1986. (App. p. 1A.) Petitioner's timely motion to reargue was denied by the Supreme Court of Connecticut on February 10, 1986. (App. p. 28A.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part: ". . .; nor shall any State deprive any person of life, liberty or property, without due process of law; . . ."

Section 53a-8 of the Connecticut General Statutes, entitled "Criminal liability for acts of another," provides as follows: "A person acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

Section 53a-134 of the Connecticut General Statutes, entitled "Robbery in the first degree: Class B felony.", provides in pertinent part: (a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime: . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . ."

STATEMENT OF THE CASE

After a trial to a state jury, petitioner Marguerite Findlay was convicted of robbery in the first degree by aiding, in violation of Connecticut General Statutes §§ 53a-134(a)(4) and 53a-8. As a result of that conviction, petitioner was sentenced to a term of imprisonment of seven years.

On direct appeal, the Supreme Court of Connecticut affirmed petitioner's conviction. *State v. Findlay*, 198 Conn. 328, 502 A.2d 921 (January 14, 1986). On February 10, 1986, the Supreme Court of Connecticut denied petitioner's timely motion to reargue.

In this petition, petitioner seeks review of a single question: Whether the petitioner's federal constitutional right to due process of law was violated by a state trial court's jury instructions which (1) defined a "reasonable doubt," inter alia, as a "doubt for which a valid reason can be assigned"; and (2) expressly told the jurors that in order to acquit the petitioner, they would have to be able to "reconcile" or "explain" all the established facts and circumstances on a theory consistent with innocence; but that in order to convict, they need only find "certain facts to be proven," and if the only reasonable inference to be drawn from the existence of "those" facts was guilt, such a verdict should be returned.

A. The Evidence

Petitioner's prosecution for aiding robbery in the first degree stemmed from the robbery of a bank in Bridgewater, Connecticut. The essential evidence introduced at trial was summarized by the Supreme Court of Connecticut in its opinion affirming the judgment of conviction:

> It is undisputed that the New Milford Savings Bank in Bridgewater was robbed on Friday, July 31, 1981, at approximately 10:15 a.m., by two armed men

wearing rubber face masks. The robbers absconded with $8282 in a 1973 rust colored Ford Torino automobile. As the robbers were driving away, bank employees were able to write down the Connecticut license plate number.

The jury could reasonably have found these additional facts: At approximately 10:10 a.m. on the day of the bank robbery, a farmer, Robert Rumovicz, was driving a tractor towing a hay bind, with an overall length of 22-24 feet, north along Second Hill Road in Bridgewater. Second Hill Road borders Rumovicz' dairy farm. A small yellow or cream colored car with a woman, later identified as the defendant, in the driver's seat was parked on the right-hand side of the road. The farmer expected the woman to move the car because the road was particularly narrow at that point and he knew he would have some difficulty in moving the hay bind past her car. It took Rumovicz approximately forty to sixty seconds to pass the car, and as he did so, he stared at the driver in an attempt to display his irritation and annoyance with her for not moving her car. About ten minutes after Rumovicz passed the defendant's car, he returned on the same road back to his farm. The car was no longer parked on the road but a rust colored Ford Torino, later identified as the one used by the robbers to flee from the bank and as having been stolen, was parked in the same area. Police officers were already examining the Ford when Rumovicz arrived.

A second witness, Alice Borodenko, testified that she was driving south on Second Hill Road at approximately 10:20 a.m. on the day of the robbery when she saw a small new cream colored car parked on the opposite side of the road with a woman in the driver's seat. At this same time, Borodenko saw a reddish-brown or "root beer colored" car approaching from the opposite direction and she stopped her car to allow

it to pass the cream colored car. The reddish car, however, parked behind the cream colored car and two men got out of the car. The passenger grabbed a package from the back seat of the car. Borodenko continued driving, and while looking in her rearview mirror, she saw both men run to the other car and she saw one man open a door of the cream colored car. At this point her car had negotiated either a dip in the road or a curve and she was then unable to view the men further. A few minutes later, when the police arrived on the scene, only the Ford, identified as the same car Borodenko had seen, was still parked on the road.

Rumovicz was able to give a description of the car and its driver to the police within minutes after seeing them. He described the car to the police as a beige/tan/yellow Dodge because he recognized its emblem and because he saw a red and white Dodge dealer vanity plate on the front of the car after he had passed it. Later in the day of the robbery, Rumovicz accompanied police officers to a Dodge dealership where he identified the model of the car as an Omni. At a second Dodge dealership, Rumovicz identified a Bosco Dodge dealer's plate as the plate that he had observed was on the front of the defendant's car. It was undisputed that the defendant was driving a rented yellow 1981 Dodge Omni with a Bosco Dodge vanity or dealer front plate on the day of the robbery. The defendant, a grant administrator for the town of Beacon Falls, reported late to work on Friday, July 31, arriving sometime between 11:08 and 11:30 a.m.

On the day of the robbery, Rumovicz also described the woman driver of the Dodge as heavyset—"heavier at the bottom than at the top." She was approximately 30 years old and she was wearing tinted eyeglasses, with large frames rounded at the

bottom. He testified that she was wearing a white dress with black prints or circles spaced evenly over the dress. Rumovicz' initial description to the police also included a description of the woman's hair as a "Shirley Temple hairdo," greasy-looking and oily, with an "unnatural" appearance. He later testified at trial that she had a "birthmark, a mole or something" on her face. At trial, a little more than two months after the robbery, Rumovicz positively identified the defendant as the driver once she had put on her glasses at defense counsel's request.

On the basis of Rumovicz' initial description of the woman driver of the Omni, Detective Robert Connor of the Connecticut state police had a suspect in mind—the defendant Marguerite Findlay. On the afternoon of the robbery, Connor asked Rumovicz to accompany him to the Beacon Falls town hall parking lot to view an automobile. While in the parking lot, and after Rumovicz identified the defendant's car as the one he had seen earlier on Second Hill Road, the defendant left the town hall and walked to her car. Rumovicz identified the defendant as resembling or "strongly" resembling the woman he had seen earlier that day in the Omni, except for her hair. Rumovicz also testified that a photograph of the defendant shown to him by Connor several days after the robbery "looked" like the woman he had seen in the Omni.

State v. Findlay, supra, 198 Conn. at 330–33, 502 A.2d at 923–24 (footnotes omitted)

Neither of the hold-up men was apprehended or identified, and petitioner was the only person arrested in connection with this offense.

At trial, petitioner denied any participation in the bank robbery, and presented an alibi defense. She testified that at

approximately 10:30 A.M. on the day of the robbery, she left her home in Naugatuck, Connecticut—25.5 miles from the bank in Bridgewater—to drive to her job at the town hall in Beacon Falls, Connecticut. By her own accounting, she arrived at the town hall at approximately 11:08 A.M.

Petitioner's alibi was corroborated in whole or in part by four other witnesses, three of whom placed her in Naugatuck sometime between 10:00 and 10:30 a.m. that day.

B. The "Reasonable Doubt" Instructions

At petitioner's trial, the jury was given the following instructions on the concept of reasonable doubt:

> Now, in all criminal cases, ladies and gentlemen, the accused is presumed to be innocent until she is proven beyond a reasonable doubt guilty. That means that at the moment she was presented before you for trial, nothing that you knew about her past or might surmise or guess about her past should be considered by you at all. And she stood before you free of any bias, prejudice or burden arising from her position as the accused person. Insofar as you are concerned, she was then innocent and she continues so until such time as the evidence in the matters produced here in the courtroom and in the course of the trial satisfy you that she is guilty. Up to the moment when you are satisfied beyond reasonable doubt, from what has taken place here in the courtroom that she is guilty, then so far as you are concerned, she is innocent. This presumption requires that if a piece of evidence offered is capable of two reasonable constructions, one of which is consistent with innocence, it must be given the construction of innocence. The burden is upon the State to prove the accused guilty of the crime charged beyond a reasonable doubt. The fact that the accused has been arrested is not to be used

against her in any way. You are not to infer any taint or imputation of guilt from the fact that she sits before you in the courtroom charged with a crime. The burden is upon the prosecution throughout. And if the prosecution does not prove its case beyond a reasonable doubt, then you must acquit the defendant. The burden, then, is upon the State and it is to prove the accused guilty of the crime of which she is charged. That means that the State must prove every element necessary to constitute the crime charged. And I shall explain them to you in a moment. It is not sufficient for the State to prove certain of those elements, for if proof of even one is lacking, you must find the accused not guilty. The State, in other words, may sustain the burden of proof which rests upon it only if the evidence before you establishes the existence of every element constituting the crime charged, beyond a reasonable doubt.

The phrase "reasonable doubt" has no technical or unusual meaning. You can arrive at the real meaning of it by emphasizing the word "reasonable". A reasonable doubt for which a valid reason can be assigned; it is a doubt which is something more than a guess or a surmise. It is not a conjecture or a fanciful or a captious doubt. A reasonable doubt is not a doubt which is raised by someone simply for the sake of raising a doubt; nor is it a doubt suggested by ingenuity of counsel or of a juror which is not warranted by the evidence. A reasonable doubt, in other words, is a real doubt, an honest doubt, a doubt which has its foundation in the evidence or in the lack of evidence. It is such a doubt as in the series of affairs of your everyday life, you would pay heed to. Absolute certainty in the affairs of life is almost never attainable. And the law does not require absolute certainty on the part of the jury before it returns a verdict of guilty. The law does not require proof beyond all doubt. But the law does require that after hearing

all the evidence, if there is something in the evidence or lack of evidence which leaves in the minds of the jurors, as reasonable men and women, a reasonable doubt as to the guilt of the accused, then the accused must be given the benefit of that doubt and acquitted. It necessarily follows that if any fact or evidence bears equally two ways, one towards innocence and the other towards guilt, then you must give it that direction which tends towards innocence. It is incumbent upon the State to negate every supposition not in itself unreasonable or improbable which is consistent with the innocence of the accused. *If you can, in reason, reconcile all the facts proven with any reasonable theory consistent with innocence, of course, you cannot find the defendant guilty.* The conclusion of guilt requires proof which precludes every reasonable theory except that which tends to support and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. *If the existence of all the facts and circumstances which you believe existed can be explained reasonably on some basis other than that the accused committed the crime charged, then the State has not made out a case. But if you find certain facts to be proven and if the only reasonable inference to be drawn from the existence of those facts is that the accused committed the crime charged, then you should not slink from drawing that inference and finding her guilty.*

No contemporaneous objections were made with respect to the foregoing instructions.

On appeal to the Connecticut Supreme Court, the petitioner contended that the trial court's instructions on the requirement of proof beyond a reasonable doubt impermissibly lowered the burden of proof required for conviction, thereby violating her right to due process of law under the United States and Connecticut Constitutions. Specifically, petitioner claimed in her brief on appeal that the instructions were

constitutionally objectionable in that (1) a "reasonable doubt" was defined as a "doubt for which a valid reason can be assigned"; and (2) the jurors were effectively told that in order to acquit the petitioner, they would have to be able to "reconcile" or "explain" all the established facts and circumstances on a theory consistent with innocence; but that in order to convict, they need only find "certain facts to be proven," and if the only reasonable inference to be drawn from the existence of "those" facts was guilt, such a verdict should be returned.

Although petitioner's reasonable doubt claims had not been raised at trial, the Connecticut Supreme Court reviewed the claims under the "exceptional circumstance exception" of *State v. Evans*, 165 Conn. 61, 327 A.2d 576 (1973) (permitting review of newly raised claims of error "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial."). The Connecticut Supreme Court thus explicitly recognized the constitutional dimension of petitioner's claims, but nevertheless rejected them.

With respect to the first asserted error ("a doubt for which a valid reason can be assigned"), the Connecticut Supreme Court, citing its decision in *State v. Derrico*, 181 Conn. 151, 170–71, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S.Ct. 789, 66 L.Ed.2d 607 (1980), observed that said instruction " 'essentially defined a reasonable doubt as a doubt founded on reason as contrasted with a purely speculative doubt.' " *State v. Findlay*, supra, 198 Conn. at 346. Moreover, the court held that the "challenged definition was merely one [definition] in which the jurors could test the reasonableness of a doubt and that therefore the charge, taken as a whole, provided sufficient guidance for the jury." Id., 347.

With regard to the "reconciliation" instruction, the Connecticut Supreme Court held that it was "a correct statement of the law," and was "but *one* method which the jury was told it could use to help it reach a verdict." Id., 348 (emphasis added).

REASONS FOR GRANTING THE WRIT

- "The ability to give sound reasons for their doubts or their beliefs is not given to many [people], and . . . doubts for which [a person] can formulate no convincing reason often induce [that person] to act or to refuse to act." *Pettine v. Territory of New Mexico*, 201 F.489, 496 (8th Cir. 1912).

- ". . . when a jury is told that a reasonable doubt is a doubt that can be articulated, the prosecutor's burden of proof is unconstitutionally eased." *Adams v. South Carolina*, 464 U.S. 1023, 1025, 104 S.Ct. 558, 78 L.Ed.2d 730 (1983) (Marshall and Brennan, JJ.s, dissenting from denial of certiorari).

In *Pettine v. Territory of New Mexico*, 201 F.489, (8th Cir. 1912), the United States Court of Appeals for the Eighth Circuit reversed a criminal conviction on the grounds, inter alia, that Mr. Pettine's jury had been instructed that " 'a reasonable doubt is one for which a reason could be given based on the evidence or want of evidence in the case.' " Id., 495-97. The *Pettine* opinion, issued in 1912, noted that the instruction there in question "has been the subject of continuous and frequent challenge, and there is a conflict of authority over the question of its accuracy." Id., 495 (citing cases pro and contra).

Sixty years later, when Justice Marshall dissented from the denial of certiorari in *Butler v. South Carolina*, 459 U.S. 932, 103 S.Ct. 242, 74 L.Ed.2d 191 (1982), the "conflict of authority" adverted to in *Pettine*, supra, was still evident. In *Butler*, a capital case, the trial court's charge to the jury at the sentencing stage included the instruction that a reasonable doubt means " 'a substantial doubt for which an honest person seeking the truth can give a real reason.' " Id., 934. Although the reasonable doubt instructions were objectionable on other grounds, Justice Marshall observed that "[t]he danger [that a jury may make a required finding "on a lesser showing than 'beyond a reasonable doubt' "] is exacerbated when the jurors are told that they must be able to

articulate a 'real reason' for their substantial doubt." Id., 934-35. *Pettine v. Territory of New Mexico*, supra, was cited by Justice Marshall relative to the inherent inability of people " 'to give sound reasons for their doubts . . .' " Id., 935. Justice Marshall further noted that "[m]any courts have disapproved the requirement that a juror be able to articulate a reason for his doubt." Id., 932 n.3 (citing *Dunn v. Perrin*, 570 F.2d 21 (1st Cit.), cert. denied, 437 U.S. 910, 98 S.Ct. 3102, 57 L.Ed.2d 1141 (1978), and *Commonwealth v. Robinson*, 382 Mass. 189, 415 N.Ed.2d 805 (1981)).

Fourteen months after certiorari was denied in *Butler v. South Carolina*, supra, this Court again declined to resolve the continuing conflict over the propriety of trial and sentencing instructions which included, inter alia, the statement that a reasonable doubt is "a doubt for which you give a reason." *Adams v. South Carolina*, 464 U.S. 1023, 104 S.Ct. 558, 78 L.Ed.2d 730 (1983) (denying certiorari in *State v. Adams*, 279 S.C. 228, 306 S.E.2d 208 (1983)). Two justices of this Court (Marshall and Brennan, JJ.s) dissented from the denial of certiorari in *Adams v. South Carolina*, and their dissenting opinion is highly relevant to the present inquiry. That dissenting opinion makes clear that the *present* petition, like Mr. Adams' petition, "presents an important issue of federal constitutional law, upon which State Supreme Courts and a Federal Court of Appeals are divided." Id., 1023-24. Indeed, the dissenting opinion in *Adams* strikes particularly close to home, because that opinion (at p. 1026 n.3) cites *State v. Derrico*, supra — upon which the Connecticut Supreme Court *relied* in upholding Ms. Findlay's conviction — as one of several cases directly conflicting with the First Circuit's decision in *Dunn v. Perrin*, supra. "Since this conflict is the culmination of chronic disagreement over the correct definition of reasonable doubt" — and since the conflict has continued unabated since certiorari was denied in *Adams*, supra — the present petition is "an appropriate candidate for review." *Adams v. South Carolina*, supra, 1026. See R.17.1(b),(c), Rules of the Supreme Court of the United States.

There is no need to belabor the point that a conflict exists. However, a few additional citations will serve to illuminate the manner in which various courts have treated the instruction here in question (or close variants thereof). See, e.g., *State v. Boswell*, 294 S.E.2d 287, 295–96 (W.Va. 1982) (reversing conviction where jury instructed that reasonable doubt was "one for which he who entertains such doubts should be able to give a good and substantial reason" therefor); *State v. Keffer*, 281 S.E.2d 495 (W.Va. 1981) (reversing conviction where instructions included, inter alia, statement that reasonable doubt is "one for which a man who entertains such doubt would be able to give a good and substantial reason arising from the evidence or a lack of evidence in the case"); *People v. LaRosa*, 492 N.Y.S.2d 633 (A.D. 1985) (reversing conviction based on court's use of phrases "moral certainty" and "reasonable degree of certainty" in explaining reasonable doubt; this error was aggravated by court's charge "that the jury had to come up with a 'substantial' and 'articulate' reason for its doubts, and by suggesting that they might even be required to 'tell what that doubt is.' "); *Isaaks v. State*, 337 So.2d 928, 930 (Miss. 1976) (instruction that reasonable doubt is "a doubt for which a reason (or reasons) can be given, arising from a fair and rational consideration of the evidence or the lack of evidence", was erroneous; the instruction "in effect tells jurors that they should be able to state a reason why they have a doubt," and "jurors are never required to articulate any explanation of their decision . . ."); *Simmons v. State*, 206 Miss. 535, 40 So.2d 289, 290 (1949) (voir dire instruction to jurors that "reasonable doubt must be of the type that you can give a good reason for when you get back in the jury room and discuss the matter, and if you have a doubt in your mind and some fellow juror asks you if you have a doubt, you will be able to give your reasons for having entertained such doubt," was erroneous); *Young v. State*, 373 P.2d 273 (Okla. Crim. App. 1962) (noting distinction between instructions defining reasonable doubt as a "doubt that you can give a reason for," and as "a doubt founded upon reason"; and noting that the former is condemned because it "requires that the juror be able to give a reason why he doubts the defendant's

innocence or guilt"), cert. denied, 371 U.S. 957, 83 S.Ct. 513, 9 L.Ed.2d 504 (1963). *Commonwealth v. Costello*, 392 Mass. 393, 467 N.E.2d 811, 817 (1984) (instruction that "a reasonable doubt is a doubt for which one could give a reason" disapproved, but "its use is not necessarily reversible error); *Commonwealth v. Lanoue*, 392 Mass. 583, 467 N.E.2d 159 (1984) (instruction that reasonable doubt is a "doubt for which a good reason can be given," "should not have been used," but was not reversible error); *Baker v. State*, 477 So.2d 496, 502–503 (Ala. Crim. App. 1985) (instructing jury that reasonable doubt was a doubt for which a real and substantial reason can be given, held not erroneous); *Dunn v. Perrin*, supra (statement defining reasonable doubt as "doubt as for the existence of which a reasonable person can give or suggest a good and sufficient reason" was improper, although not necessarily reversible error "standing alone"); *Robinson v. Callahan*, 694 F.2d 6, 7 (1st Cir. 1982) (charge that a reasonable doubt is "a doubt based on reason, a doubt for which you can give a reason," held not unconstitutional[1]); *Smith v. Bordenkircher*, 718 F.2d 1273, 1277–78 (4th Cir. 1983) (instruction that reasonable doubt was "one for which he who entertains such doubt should be able to give a good and substantial reason" not unconstitutional; but see dissenting opinion at 1278–79, expressing view that instruction was unconstitutional), cert. denied, 466 U.S. 976, 104 S.Ct. 2355, 80 L.Ed. 828 (1984); *Murphy v. Holland*, 776 F.2d 470, 476 (4th Cir. 1985) (instruction that reasonable doubt is "a doubt for which a reason can be given" not erroneous; but noting [at 476 n.4] that "[i]n some cases, jurors may harbor substantial doubt concerning an accused's guilt but also may be unable to articulate a specific reason for their uncertainty."); *United States v. Davis*, 328 F.2d 864, 867–68 (2nd Cir. 1964) (instruction that defined reasonable doubt as

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[1] The *Robinson* opinion is curious. It states that "[i]n *Tsoumas et al. v. New Hampshire*, 611 F.2d 412 (1st Cir. 1980), this court held that such a charge is not constitutional error." *Robinson v. Callahan*, supra, at 7. However, an examination of the charge reviewed in *Tsoumas* reveals that while the jury was told a reasonable doubt "must be a doubt *based* on reason," the jury was *not* instructed in terms of a doubt for which they could *give* or *articulate* a reason. *Tsoumas*, at 611 F.2d 412 (emphasis added).

"one for which, when asked what it is by a fellow juror, 'you can give a reason, then that indicates that it is a reasonable doubt . . .' ", was " 'not approved' " and " 'perhaps unwise' ", but was " 'not erroneous' "); *Barber v. Scully,* 557 F.Supp. 1292, 1296 (S.D.N.Y. 1983) (charge that "[a] reasonable doubt can be said to be such a doubt for which a reasonable man or woman of reasonable intelligence can give some good reason for entertaining if called upon to give such a reason," held not constitutionally defective), aff'd, 731 F.2d 1073 (2nd Cir. 1984) (but certification of probable cause for appeal did not encompass claim re instructions on reasonable doubt).

Given the indisputable conflict of authority, there is an imperative need for this Court to give authoritative constitutional guidance to American trial courts on this critically important issue. "Discussion of the concept [of proof beyond a reasonable doubt] is perhaps *the most important aspect* of the closing instruction to the jury in a criminal trial." *Dunn v. Perrin,* supra, 25 (emphasis added). And, although this Court has repeatedly warned that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury"; *Miles v. United States,* 103 S.Ct. 304, 312, 26 L.Ed. 481 (1880); *Dunbar v. United States,* 156 U.S. 185, 199, 15 S.Ct. 325, 39 L.Ed. 390 (1985); *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 99 L.Ed. 150 (1954); American trial judges have been disinclined to heed that caveat. See *Murphy v. Holland,* supra, 776 F.2d at 475 ("trial courts have repeatedly expressed their unwillingness to dispense with their traditional practice of charging the jury on reasonable doubt"). Thus, until resolved by this Court, the conflict described above is likely to continue.

The constitutional foundation for petitioner's claim is, of course, the Due Process Clause, which precludes conviction of an accused "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Whether the instruction here in question is viewed as reducing, diluting, or lessening the state's

burden of proof; or as shifting that burden to the accused; see *Pettine v. Territory of New Mexico*, supra, 497; the instruction is equally defective. "In order to entertain a reasonable doubt, it is not necessary for a juror to be able to articulate a good and substantial reason for his or her doubt." *State v. Keffer*, supra, 497. An instruction which states that it *is* or may be necessary to do so, flies in the face of due process: "I continue to believe that trial courts err when they instruct juries that a reasonable doubt means . . . 'a doubt for which you give a reason'." *Adams v. South Carolina*, supra, 1025 (Marshall,J., dissenting from denial of certiorari, with whom Brennan,J., joins). As noted in *Pettine v. Territory of New Mexico*, supra, 497, such an instruction "destroys the rule of reasonable doubt, and substitutes for a reasonable doubt a *demonstrable* doubt logically and conclusively sustained by the evidence or the want of it." (emphasis added). That substitution cannot and should not be countenanced.

Finally, it must be emphasized that the definitional error occurring in this case was compounded by the trial court's subsequent instructions explaining the "operation" of the reasonable doubt rule. In effect, the jurors were told that acquittal required "reconciliation" or "explanation" of "all the facts and circumstances" in a manner or theory consistent with innocence; while conviction could be based on the finding of "certain facts" from which only an inference of guilt could be drawn.

The present case is thus an appropriate one for the exercise of this Court's discretionary jurisdiction. The case against petitioner was not one of overwhelming guilt; but rather was a case where the instructional errors complained of misled the jury and violated the petitioner's right to due process of the law.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgments and opinion of the Supreme Court of Connecticut.

RESPECTFULLY SUBMITTED,

MARGUERITE FINDLAY, Petitioner

BY: Richard Emanuel

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Counsel for Petitioner

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

MARGUERITE FINDLAY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

INDEX TO APPENDIX

Page

Opinion of the Connecticut Supreme Court in *State v. Findlay*, 198 Conn. 328, 502 A.2d (1986) 1A

Motion to Reargue in Connecticut Supreme Court 22A

Order of Connecticut Supreme Court denying Motion to Reargue 28A

STATE OF CONNECTICUT *v.* MARGUERITE FINDLAY (11158)

HEALEY, SHEA, DANNEHY, SANTANIELLO and CALLAHAN, Js.

Convicted of the crime of robbery in the first degree by aiding, the defendant appealed to this court. *Held:*

1. This court could not say that there was insufficient evidence to establish the defendant's guilt beyond a reasonable doubt; the facts proved and the reasonable and logical inferences that the jury could draw from them strongly supported the verdict finding the defendant guilty of robbery in the first degree by aiding.
2. The trial court did not err in denying the defendant's motion to suppress an in-court identification of her by a witness for the state, which identification, she claimed, was tainted by two out-of-court identifications allegedly obtained by means of impermissibly and unnecessarily suggestive procedures; there was no support for her claim that the circumstances under which the first out-of-court identification was made were unnecessarily suggestive, and, although the procedure used to obtain the second was unnecessarily suggestive, the in-court identification of her was, nevertheless, reliable in light of the totality of the circumstances.
3. The trial court did not abuse its discretion in admitting, as relevant, evidence to the effect that two days before the robbery the defendant had been seen with two men in a car matching the description of the one in which she was observed, also with two men, on the morning of the robbery; more, the defendant failed to sustain her burden of proving that, as she claimed, the state's references to the names of the men were "materially injurious" to her.
4. This court could not agree with the defendant that certain remarks made in the closing argument by the prosecuting attorney deprived her of a fair trial; the trial court, therefore, did not err in denying her motion for a new trial.
5. The trial court's instructions to the jury on the requirement of proof beyond a reasonable doubt were not erroneous.

Argued November 8, 1985—decision released January 14, 1986

Information charging the defendant with the crime of robbery in the first degree by aiding, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Stoughton, J.;* verdict and judgment of guilty, from which the defendant appealed to this court. *No error.*

Richard Emanuel, for the appellant (defendant).

F. Kent Sistare, Jr., special assistant state's attorney, with whom were *Carl Schuman,* assistant state's attorney, and, on the brief, *Dennis A. Santore,* state's attorney, for the appellee (state).

ARTHUR H. HEALEY, J. The defendant, Marguerite Findlay, was charged in a substitute information, with the crime of robbery in the first degree by aiding, in violation of General Statutes §§ 53a-134 (a) (4) and 53a-8.[1] She was convicted after a jury trial and sentenced to the custody of the commissioner of correction for a term of seven years. The defendant appeals from the judgment of conviction.[2]

The defendant raises five issues on appeal: (1) whether there was sufficient evidence to establish the defendant's guilt beyond a reasonable doubt; (2) whether the court erred in denying the defendant's motion to sup-

[1] General Statutes § 53a-134 (a) (4) provides: "ROBBERY IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of robbery in the first degree when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a weapon from which a shot could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, robbery in the second degree, robbery in the third degree or any other crime."

General Statutes § 53a-8 provides: "CRIMINAL LIABILITY FOR ACTS OF ANOTHER. A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

[2] The appeal form, filed by trial counsel, stated that the appeal was being taken "from a jury verdict of guilty . . ." rather than from the judgment as required by General Statutes § 52-263. As this defect in form is not jurisdictional in nature, it may be disregarded. See *State* v. *Kurvin,* 186 Conn. 555, 556 n.1, 442 A.2d 1327 (1982).

press identification; (3) whether the defendant's rights were violated by the admission of evidence relating to two men seen with the defendant in a Dodge Omni two days before the robbery; (4) whether there was error in the denial of the defendant's motion for a new trial based on the prosecutor's remarks during closing argument; and (5) whether the court erred in its charge to the jury.

It is undisputed that the New Milford Savings Bank in Bridgewater was robbed on Friday, July 31, 1981, at approximately 10:15 a.m., by two armed men wearing rubber face masks. The robbers absconded with $8282 in a 1973 rust colored Ford Torino automobile.[3] As the robbers were driving away, bank employees were able to write down the Connecticut license plate number.

The jury could reasonably have found these additional facts: At approximately 10:10 a.m. on the day of the bank robbery, a farmer, Robert Rumovicz, was driving a tractor towing a hay bind, with an overall length of 22–24 feet, north along Second Hill Road in Bridgewater. Second Hill Road borders Rumovicz' dairy farm. A small yellow or cream colored car with a woman, later identified as the defendant, in the driver's seat was parked on the right-hand side of the road. The farmer expected the woman to move the car because the road was particularly narrow at that point and he knew he would have some difficulty in moving the hay bind past her car. It took Rumovicz approximately forty to sixty seconds to pass the car, and, as he did so, he stared at the driver in an attempt to display his irritation and annoyance with her for not moving her car. About ten minutes after Rumovicz passed the defendant's car, he returned on the same road back to his

[3] The record does not indicate that anyone other than the defendant was arrested in connection with the robbery or that any of the money was ever recovered.

farm. The car was no longer parked on the road but a rust colored Ford Torino, later identified as the one used by the robbers to flee from the bank and as having been stolen, was parked in the same area. Police officers were already examining the Ford when Rumovicz arrived.

A second witness, Alice Borodenko, testified that she was driving south on Second Hill Road at approximately 10:20 a.m. on the day of the robbery when she saw a small new cream colored car parked on the opposite side of the road with a woman in the driver's seat. At this same time, Borodenko saw a reddish-brown or "root beer colored" car approaching from the opposite direction and she stopped her car to allow it to pass the cream colored car. The reddish car, however, parked behind the cream colored car and two men got out of the car. The passenger grabbed a package from the back seat of the car. Borodenko continued driving, and while looking in her rearview mirror, she saw both men run to the other car and she saw one man open a door of the cream colored car. At this point her car had negotiated either a dip in the road or a curve and she was then unable to view the men further. A few minutes later, when the police arrived on the scene, only the Ford, identified as the same car Borodenko had seen, was still parked on the road.

Rumovicz was able to give a description of the car and its driver to the police within minutes after seeing them. He described the car to the police as a beige/tan/yellow Dodge because he recognized its emblem and because he saw a red and white Dodge dealer vanity plate on the front of the car after he had passed it.[4] Later in the day of the robbery, Rumovicz accompanied police officers to a Dodge dealership where he iden-

[4] The farmer used three different colors to describe the car to the police. A Dodge dealer told the police that Omnis are not available in tan but are available in two different shades of yellow. The witnesses at the trial who

tified the model of the car as an Omni. At a second Dodge dealership, Rumovicz identified a Bosco Dodge dealer's plate as the plate that he had observed was on the front of the defendant's car. It was undisputed that the defendant was driving a rented yellow 1981 Dodge Omni with a Bosco Dodge vanity or dealer front plate on the day of the robbery.[5] The defendant, a grant administrator for the town of Beacon Falls, reported late to work on Friday, July 31, arriving sometime between 11:08 and 11:30 a.m.

On the day of the robbery, Rumovicz also described the woman driver of the Dodge as heavyset—"heavier at the bottom than at the top." She was approximately 30 years old and she was wearing tinted eyeglasses, with large frames rounded at the bottom. He testified that she was wearing a white dress with black prints or circles spaced evenly over the dress.[6] Rumovicz' initial description to the police also included a description of the woman's hair as a "Shirley Temple hairdo," greasy-looking and oily, with an "unnatural" appearance. He later testified at trial that she had a "birthmark, a mole or something" on her face. At trial, a little more than two months after the robbery, Rumovicz positively identified the defendant as the driver once she had put on her glasses at defense counsel's request.

On the basis of Rumovicz' initial description of the woman driver of the Omni, Detective Robert Connor of the Connecticut state police had a suspect in mind—the defendant Marguerite Findlay. On the afternoon

testified about the Omni gave varying descriptions of its color, but all were able to identify it as the car claimed by the state to have been used by the defendant.

[5] The 1981 Dodge Omni the defendant was driving on July 31, 1981, had been borrowed from a friend who had rented it for several days.

[6] A police officer testified that Rumovicz' initial description was of a white dress with a red, repetitive design.

of the robbery, Connor asked Rumovicz to accompany him to the Beacon Falls town hall parking lot to view an automobile. While in the parking lot, and after Rumovicz identified the defendant's car as the one he had seen earlier on Second Hill Road, the defendant left the town hall and walked to her car. Rumovicz identified the defendant as resembling or "strongly" resembling the woman he had seen earlier that day in the Omni, except for her hair. Rumovicz also testified that a photograph of the defendant shown to him by Connor several days after the robbery "looked" like the woman he had seen in the Omni.

I

The defendant claims that the evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. "When a verdict is challenged because of insufficient evidence, the issue is whether the jury could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt. . . . *State* v. *Benton*, 161 Conn. 404, 407, 288 A.2d 411 (1971)." *State* v. *Nemeth*, 182 Conn. 403, 410, 438 A.2d 120 (1980); see *State* v. *Carter*, 196 Conn. 36, 44, 490 A.2d 1000 (1985). "The evidence must be given a construction most favorable to sustaining the jury's verdict." *State* v. *Carter*, supra.

There was sufficient evidence from which the jury could have concluded that the defendant was the driver of the Dodge Omni Rumovicz had seen on the morning of the robbery. Rumovicz positively identified her at trial, including testifying to a corroborating birthmark or mole which he did not see in either the parking lot identification or in the side-view photograph shown to him by Connor. While Rumovicz had not told the police about this birthmark or mole, he testified at

trial that he repeatedly recalled that he "kept looking back at the [defendant's] face" on Second Hill Road and "I kept seeing a birthmark or a mole." There was evidence at the trial that the defendant has "a birthmark or brownish mark over the left side of her upper lip." Although her hair did not match his initial description, the jury could reasonably have inferred that she had somehow altered her hair style in order to avoid recognition, as Rumovicz had described the hair as unnatural looking.

Borodenko corroborated the description of the car and she also saw two men running from the Ford Torino towards the Dodge Omni and opening one of the doors. Although Borodenko did not see the men enter the car, the jury could reasonably have inferred that the sequence of events explained how, within minutes of the robbery, the Dodge Omni was gone, the two robbers had abandoned the Ford and were able to flee the area. The defendant's alibi defense of purchasing gasoline at a certain Mobil gas station could not be confirmed. The attendant working at the gas station on July 31, 1981, from 6:30 a.m. to 1 p.m. testified that he did not remember seeing a subcompact car fitting the description of the getaway car that he had heard broadcast over a police scanner come into the station that morning. Nor did he remember seeing the defendant come into the station that morning. In addition, the defendant was absent from work for most of the morning of the robbery.

The jury, as the trier of fact, determines the credibility of witnesses, and it is not the province of this court to retry the facts or to determine the weight which should have been accorded witnesses' testimony. Viewing the evidence as a whole and in a light most favorable to sustaining the jury's verdict, we cannot say that there was insufficient evidence to establish the defendant's guilt beyond a reasonable doubt. On the

contrary, the facts proved, and the reasonable and logical inferences that the jury could draw from them, strongly support the verdict finding the defendant guilty of robbery in the first degree by aiding.

II

The defendant's second claim of error is that the court erred in denying the defendant's motion to suppress identification. The defendant filed a motion to suppress any testimony of Robert Rumovicz "regarding any possible identification of [the defendant] subsequent to the morning of July 31, 1981, as there was an impermissibly suggestive identification procedure utilized by the state which fatally taints any subsequent in Court or out of Court identifications." A hearing on the motion to suppress was held in the absence of the jury and before there was an in-court identification of the defendant by Rumovicz.[7] The motion was denied by the trial court and a proper exception was taken.

The two out-of-court identification procedures at issue occurred on July 31, 1981, and approximately a week to ten days later. The first identification procedure occurred on the afternoon of the robbery at the Beacon Falls town hall parking lot. Connor, who accompanied Rumovicz to the lot, testified that the "primary reason" for the trip was to view an automobile. Connor had some information that the defendant would be leaving work at approximately 4 p.m. The viewing of the automobile took place at approximately 3:30 p.m., and, "within moments" of the identification of the car by Rumovicz, the defendant walked from the town hall to the Dodge Omni. The distance between the car in which Connor and Rumovicz were seated and the Dodge Omni was approximately 75 to 100 feet. The detective did

[7] An in-court identification of the defendant, outside of the presence of the jury, was made by Rumovicz one day before the hearing on the motion was held. That identification was withdrawn by the state.

not expect the defendant to be in the parking lot at that particular time as the trial court found at the hearing on the motion to suppress. Rumovicz indicated to the detective that the defendant "strongly resembled" the woman in the Omni that morning, "only the hair was different."

The second identification procedure occurred at Rumovicz' farm approximately ten days after the robbery. Connor was questioning an employee of Rumovicz, who was a witness to another incident under investigation, and was showing him several photographs. When Rumovicz approached Connor, who was seated in his car, he briefly showed Rumovicz a single photograph of the defendant.[8] The detective held the picture while Rumovicz viewed it from outside the car. Rumovicz said the photograph resembled the woman in the car but that the hair was not the same.

The state did not offer evidence of either out-of-court procedure. The defense, however, did elicit evidence of the two out-of-court identification procedures for impeachment purposes after the court denied the motion to suppress and permitted the in-court identification of the defendant by Rumovicz.

The defendant claims that both out-of-court identification procedures were impermissibly and unnecessarily suggestive and that, therefore, the in-court identification was erroneously admitted. We do not agree. As this court has repeatedly stated, the required inquiry in determining whether identification procedures violate a defendant's due process rights is "made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was

[8] Connor testified that the photograph was taken at the state police barracks the day the defendant was arrested. It was a Polaroid instant photograph with a profile of the right side of the defendant's face and hair. There were no marks on the photograph indicating when, where, or for what purpose, it was taken.

unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the 'totality of the circumstances.' " *State* v. *Theriault,* 182 Conn. 366, 371-72, 438 A.2d 432 (1980).

The first identification procedure was not unnecessarily suggestive. The defendant, in making her claim, argues that the viewing of the defendant in the town hall parking lot was akin to a "show-up"—the presentation of a single suspect to an eyewitness for possible identification. Unlike many cases in which a suspect in the custody of the police is presented to a witness for identification; see, e.g., *State* v. *Middleton,* 170 Conn. 601, 368 A.2d 66 (1976); the defendant was not under arrest at the time of the viewing, she was not in custody, and most significantly, the viewing was unplanned, as the trial court found. The primary purpose of the detective and Rumovicz was to view the defendant's car before she left that day from work. The fact that she left work approximately one-half hour early could not be attributed to any arrangement by Connor. There is no support to the defendant's claim that the town hall parking lot viewing was unnecessarily suggestive.

The second identification procedure involved a single photograph of the defendant shown to Rumovicz by Connor. Upon a "motion to suppress evidence based upon photographic identifications, the defendant as the moving party must bear the initial burden of proving that the photographic identification was unconstitutional in some manner." *State* v. *McKnight,* 191 Conn. 564, 570, 469 A.2d 397 (1983); *State* v. *Vass,* 191 Conn. 604, 608, 469 A.2d 767 (1983); *State* v. *Hafner,* 168 Conn. 230, 235, 362 A.2d 925, cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975). As the defendant notes, the "test of an unnecessarily suggestive identification procedure depends on the facts and cir-

cumstances of each case." See *Simmons* v. *United States,* 390 U.S. 377, 383, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *State* v. *Soriano,* 2 Conn. App. 127, 130–31, 476 A.2d 633 (1984).

The defendant argues that the viewing of the single photograph by Rumovicz was unnecessarily and impermissibly suggestive. Absent exigent circumstances that require police officers "promptly [to establish] either the defendant's complicity or his innocence"; *State* v. *Perez,* 198 Conn. 68, 74, A.2d (1985); the showing of a single photograph of a defendant is almost always unnecessarily and impermissibly suggestive. *State* v. *Dupree,* 196 Conn. 655, 667, 495 A.2d 691 (1985). As there were no exigent circumstances or other compelling reason present to justify the showing of the photo, we agree with the defendant that the second identification procedure was unnecessarily suggestive.

Although the viewing of the photo was unnecessarily suggestive, the defendant still cannot prevail because the in-court identification itself was nevertheless reliable in light of the totality of the circumstances. "[R]eliability is the linchpin in determining the admissibility of identification evidence." *State* v. *Doolittle,* 189 Conn. 183, 192, 455 A.2d 843 (1983); see *Manson* v. *Brathwaite,* 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); *State* v. *Fullwood,* 193 Conn. 238, 250–51, 476 A.2d 550 (1984). The factors to be considered in a reliability analysis are well established.[9] See *Manson* v. *Brathwaite,* supra; *Neil* v. *Biggers,* 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The defendant has failed to sustain her burden of proving that the viewing of the photograph in this case was unconstitutional.

[9] The factors include a consideration of: the witness' opportunity to view; his degree of attention; the accuracy of his description; his level of certainty; and the time between the crime and the confrontation. *Manson* v. *Brathwaite,* 432 U.S. 98, 114–15, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

The reliability of the identification is disclosed by the circumstances set out below. The facts surrounding the display of the photo indicate that it was unplanned and unarranged. Connor was present at Rumovicz' farm investigating an unrelated incident in which a white Dodge Omni was stuck in a ditch on that same portion of Second Hill Road in which the defendant was seen in a Dodge Omni. The detective was speaking to one of Rumovicz' farm employees who had helped the woman involved in that incident. Of the photographs he was showing the employee, one was a photograph of the defendant taken after her arrest. The viewing of the photo by Rumovicz, after he had voluntarily approached the detective, was brief. At trial, Rumovicz testified that the photo he saw was of the defendant at a party or surrounded by other people.[10] In fact, at trial, Rumovicz did not "really remember the photo that much." There is little evidence, if any, that the photograph so briefly viewed by Rumovicz figured into his in-court identification of the defendant. Rumovicz had an ample opportunity to view the defendant through her open car window on a clear day. He focused carefully on her face in order to express his annoyance with her. He made a positive in-court identification of the defendant. Included in his in-court identification of the defendant was the description of a mole or birthmark which Rumovicz had not previously mentioned and which could not have been observed in either pretrial identification procedure. This corroborating evidence as well as his detailed initial description and his observations on the morning of July 31, 1981, form the entire basis for his in-court identification. Thus, neither procedure tainted his in-court identification. We particularly note that the trial court said: "[I] find that his [in-court] identification is based entirely upon his obser-

[10] The photo admitted into evidence was only of the right side of the defendant's face and hair. There was no other person in the photograph.

vations made on the morning of July 31st [the date of the robbery], and it's not tainted at all by any subsequent view in the Beacon Falls parking lot or having seen a snapshot for a matter of seconds, some week or ten days later." We also point out that "[t]he credibility of the witnesses in a challenge to identification evidence is a question for the trial court to determine. *State* v. *Vass,* supra, 610; *State* v. *McKnight,* supra, 571-72." *State* v. *Fullwood,* supra, 246. The trial court, therefore, did not err in denying the defendant's motion to suppress.[11]

III

The defendant raised two claims arising out of the trial court's denial of her motion for a new trial. We discuss those claims seriatum.[12]

A

The first claim is that the trial court erred in admitting evidence that the defendant was with two men in

[11] The defendant also claims, while admitting "precedent is squarely against her," that the photo displayed to Robert Rumovicz, in the absence of her counsel, violated her federal and state constitutional rights. The defendant did not raise this issue below; Practice Book § 3063; and seeks to raise it on appeal under *State* v. *Evans,* 165 Conn. 61, 327 A.2d 576 (1973). The question of when this photographic display actually took place, and hence, whether the defendant's right to counsel had attached, is unanswered. The arrest by warrant itself does not start the initiation of adversary criminal proceedings. *Kirby* v. *Illinois,* 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *State* v. *Vitale,* 190 Conn. 219, 232, 460 A.2d 961 (1983). As no fundamental constitutional right has been implicated, this claim does not present an "exceptional circumstance" reviewable under *Evans.* See *United States* v. *Ash,* 413 U.S. 300, 321, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973) (the sixth amendment does not grant the right to counsel, even if it has attached, at photographic displays conducted by the government for the purpose of allowing a witness to attempt an identification of the offender); *State* v. *Ibraimov,* 187 Conn. 348, 357, 446 A.2d 382 (1982).

[12] Our finding of no error on the trial court's action on the motion to suppress makes unnecessary any discussion of the third claim in the defendant's motion for a new trial that challenged the out-of-court identification procedures.

a Dodge Omni on July 29, 1981. The state claims that the evidence was properly admissible as relevant to a demonstration that the defendant was associated with two men in a car matching the description of the automobile seen by Robert Rumovicz on Second Hill Road the morning of the robbery. We agree.

The state introduced evidence at trial, through two witnesses, that the defendant was seen in Naugatuck with two men in a Dodge Omni with a Bosco Dodge vanity plate. The first witness, an acquaintance of the defendant's from high school, testified that he saw Marguerite Findlay seated in a car two days before the robbery, on July 29, 1981, around 4 p.m. or 5 p.m. The witness testified, after defense counsel objected, that the other occupants of the car were two men. The first witness was unable to describe the car in which the defendant was seated.

The second witness for the state testified that he owned the laundromat in front of which the Dodge Omni was parked on July 29, 1981. The first witness had been visiting him in his store on the afternoon of July 29, 1981. The second witness noticed a beige subcompact car with a Bosco Dodge plate pull up in front of his store and testified, over defense objection, that there were two men in the front seat.

The defendant, upon cross-examination by the state, admitted being at the laundromat in Naugatuck on July 29, 1981, in the afternoon, with two men in a yellow Dodge Omni. Defense counsel objected on relevancy grounds to the state's question to the defendant: "And who were you with?" The defendant named two individuals, John Paul Reid and Rodney Johnson.

"Rulings on relevancy are within the wide discretion of the trial court and will only be reversed for an abuse of that discretion." *State* v. *DeForge,* 194 Conn. 392, 399, 480 A.2d 547 (1984). "Evidence is admissible when

it tends to establish a fact in issue or to corroborate other direct evidence in the case." *State* v. *Towles,* 155 Conn. 516, 523, 235 A.2d 639 (1967); see *State* v. *Schaffer,* 168 Conn. 309, 317, 362 A.2d 893 (1975). This challenged evidence placed the defendant in the type of car observed by Rumovicz on Second Hill Road on the morning of the robbery and again that afternoon in the town hall parking lot. In addition, Alice Borodenko testified that on the morning of the robbery she observed two men, one with a package, running to that type of car after they had alighted from a Ford car which the Bridgewater bank robbers had used. There was no abuse of discretion in admitting this evidence. The state's proffer of evidence of the actions of the defendant two days before the robbery does have a tendency to prove the defendant committed the crime with which she was charged. The evidence was relevant and admissible and, as such, the jury was free to weigh the testimony as it would any other piece of evidence.

In the defendant's motion for a new trial under Practice Book § 902, she assigns as constitutional error, and as error which was materially injurious to her, the "state's references in direct and cross-examination to Rodney Johnson and John Paul Reid." The motion was denied by the trial court. "On a motion for a new trial . . . the court has discretion to weigh the evidence and to consider the credibility of witnesses to determine whether 'the interests of justice' require the granting of relief." *Gaines* v. *Manson,* 194 Conn. 510, 520 n.12, 481 A.2d 1084 (1984); see Practice Book § 902. The granting of such a motion is within the court's discretion. At no time did the state claim that the two men who had been in the Omni on July 29, 1981, were also the robbers who were seen abandoning their Ford Torino and running toward the Omni in which the defendant was seated. Any inferences that could be drawn from such evidence were left to the trier

of fact. The trial court which is in a better position than this court to "consider the credibility of witnesses" determined that these circumstances did not require a new trial in the "interests of justice." The defendant has failed to sustain her burden of proving that the elicitation of the two men's names was "materially injurious" to her.

B

The defendant's second claim in her motion for a new trial is that she was deprived of a fair trial and of her right to due process under the federal and state constitutions by certain remarks made by the prosecutor in closing argument. She also claims that the trial court erred in denying her motion for a new trial.

In closing argument, defense counsel referred to the defendant's background, including her schooling, and her daughter.[13] The prosecutor made the following remarks to the jury: "Now, Mr. Gill told you to consider one last thing; that was the background of this woman. And he told you—he listed the stuff, the background education stuff that he first delivered through testimony when Mrs. Findlay first got on the stand. His Honor will tell you that sympathy should not play a part in your deliberations. The fact that she's a mother, living alone with her child, has nothing to do

[13] The defense counsel had previously made the following remarks about the defendant's background on closing argument: "Now, if the unfair identification procedure, if the alibi defense, if the time question together do not give you a reasonable doubt about whether Marguerite Findlay is a getaway driver, then how about looking at what you know about Marguerite Findlay. She's 27 years old. She has a six-year old daughter who lives for and is cared for by her. She's a high school graduate. She had a scholarship to UConn, where she went for two years. She was going to college full time at night. She's been a volunteer worker with handicapped kids. She's on the PTA; no criminal record whatsoever and a lousy driver, to boot. Now, this is hardly the profile of a getaway driver. Her mother doesn't even want to drive in a car. It's hard to believe that those two bank robbers are going to want her to be the driver of the car."

with what you do in this courtroom. We can turn around and look at the kind of people she was hanging around with at the Bounce, as she referred to it. And certainly you can tell from some of the goings on that maybe a different picture could be painted, if we were allowed to. But His Honor will tell you that that's not something that you can consider in sitting there and deliberating in that room. What she's done before has no bearing on what she has done now." Defense counsel did not object to these remarks. In fact, he "intentionally refrained from making a contemporaneous objection or requesting a cautionary instruction." The objection was therefore waived. Practice Book § 3063.

This issue was raised in a motion for a new trial. The trial court denied the motion, stating that there was nothing in the argument which was prejudicial. The remarks at issue are considered by the state to be fair rebuttal to statements made in defense counsel's closing argument. At the trial, the defendant made no objection and did not seek any other relief. On appeal, the defendant argues that this claim is reviewable under *State* v. *Evans,* 165 Conn. 61, 327 A.2d 576 (1973). Because he claims the deprivation of a fundamental constitutional right and a fair trial, we will review this claim under the "exceptional circumstance" prong of *Evans.*

The defense counsel attempted to paint a favorable portrait of the defendant in order to create a reasonable doubt in the minds of the jury that "Marguerite Findlay is a getaway driver." In attempting to brush one more stroke onto the defense counsel's portrait in order to make it provide some contrast, the prosecutor warned the jury that "sympathy should not play a part in the deliberations." In contrast to the defendant's status as a single parent at home with her child, raised by defense counsel, the prosecutor questioned

her status as a woman who also frequented the Bounce In and questioned the "kind of people she was hanging around with [there]." The prosecutor remarked that perhaps defense counsel's portrait was not the only one that could be painted, but she then specifically warned the jury that speculation should play no part in its role.

The remarks at issue in this case were not at all egregious. Cf. *State* v. *Couture,* 194 Conn. 530, 482 A.2d 300 (1984), cert. denied, U.S. , 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985). Moreover, in our examination of this claim, the action of the trial court, because of its unique vantage point, is certainly entitled to great weight in determining the propriety of remarks of counsel and their harmfulness under all the circumstances at the trial. *State* v. *Glenn,* 194 Conn. 483, 493, 496, 481 A.2d 741 (1984). We cannot agree with the defendant that the state's comments deprived her of a fair trial. Therefore, the trial court did not err in denying her motion for a new trial.

IV

The defendant's final claim is that the court's instructions to the jury on the requirement of proof beyond a reasonable doubt impermissibly lowered the burden of proof required for conviction, in violation of her due process rights.

Although this claim was not raised in the trial court by a written request to charge or an exception, the defendant's claim warrants review under the exceptional circumstance exception of *State* v. *Evans,* supra. See *State* v. *Moss,* 189 Conn. 364, 456 A.2d 274 (1983).

The defendant claims that the instructions on reasonable doubt were erroneous in two respects. The first claimed error is that the court, in a portion of its definition of reasonable doubt, stated that it was a "doubt

for which a valid reason can be assigned."[14] The defendant, citing a dissent from a denial of certification (Marshall, J.) in *Butler* v. *South Carolina,* 459 U.S. 932, 103 S. Ct. 242, 74 L. Ed. 2d 191 (1982), states that the "inherent defect" of such an instruction is that the ability to assign a valid reason for a doubt is an ability "not given to many men."

We have upheld a similar charge in the face of a constitutional challenge in *State* v. *Derrico,* 181 Conn. 151, 170–71, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980). As we said in *Derrico,* the "instruction essentially defined a reasonable doubt as a doubt founded on reason as contrasted with a purely speculative doubt." *State* v. *Derrico,* supra, 171.

" 'It is well established . . . that individual instructions are not to be judged in artificial isolation from the overall charge.' " *State* v. *Piskorski,* 177 Conn. 677, 746, 419 A.2d 866, cert. denied, 444 U.S. 935, 100 S. Ct. 283, 62 L. Ed. 2d 194 (1979). "[T]he test to be applied to any part of a charge is whether the charge

[14] The portion of the court's instruction on the definition of reasonable doubt was as follows: "The phrase 'reasonable doubt' has no technical or unusual meaning. You can arrive at the real meaning of it by emphasizing the word 'reasonable.' A reasonable doubt for which a valid reason can be assigned; it is a doubt which is something more than a guess or a surmise. It is not a conjecture or a fanciful or a captious doubt. A reasonable doubt is not a doubt which is raised by someone simply for the sake of raising a doubt; nor is it a doubt suggested by ingenuity of counsel or of a juror which is not warranted by the evidence. A reasonable doubt, in other words, is a real doubt, an honest doubt, a doubt which has its foundation in the evidence or in the lack of evidence. It is such a doubt as in the series of affairs of your everyday life, you would pay heed to. Absolute certainty in the affairs of life is almost never attainable. A ` the law does not require absolute certainty on the part of the jury before it returns a verdict of guilty. The law does not require proof beyond all doubt. But the law does require that after hearing all the evidence, if there is something in the evidence or lack of evidence which leaves in the minds of the jurors, as reasonable men and women, a reasonable doubt as to the guilt of the accused, then the accused must be given the benefit of that doubt and acquitted."

as a whole presents the case to the jury so that no injustice will be done." *State* v. *Derrico,* supra, 170. The court provided additional guidance to the jury on the definition of reasonable doubt. The statement challenged by the defendant was not the only definition provided. The state argues that the challenged definition was merely one in which the jurors could test the reasonableness of a doubt and that therefore the charge, taken as a whole, provided sufficient guidance for the jury. We agree.

The second claimed error in the court's instruction on reasonable doubt is in the following statement: "If you can, in reason, reconcile all the facts proven with any reasonable theory consistent with innocence, of course, you cannot find the defendant guilty. The conclusion of guilt requires proof which precludes every reasonable theory except that which tends to support and is consistent with the defendant's guilt and inconsistent with any other rational conclusion. If the existence of all the facts and circumstances which you believe existed can be explained reasonably on some basis other than that the accused committed the crime charged, then the State has not made out a case. But if you find certain facts to be proven and if the only reasonable inference to be drawn from the existence of those facts is that the accused committed the crime charged, then you should not slink from drawing that inference and finding her guilty."

The defendant claims that this statement did not "clearly instruct" the jury on the doctrine of proof beyond a reasonable doubt. The defendant also claims that the instruction was constitutionally infirm because it effectively told the jury that it "would have to be able" to reconcile all the facts to reach a verdict of not guilty. The instruction merely states that "[i]f you, [the jury], can, in reason, reconcile all the facts . . . ." This instruction by the trial court is but one method which

the jury was told it could use to help it reach a verdict. The statement is a correct statement of the law. Immediately preceding the instruction on the doctrine of proof beyond a reasonable doubt the jury was given a detailed instruction on the state's requirement that it prove every element of the crime.

We cannot say that, in view of the charge read as a whole, the portions now claimed as error on appeal can be considered a basis for finding harmful error. See *State* v. *Derrico,* supra; cf. *State* v. *DelVecchio,* 191 Conn. 412, 464 A.2d 813 (1983). The instructions were therefore not erroneous.

There is no error.

In this opinion the other judges concurred.

NO. 11158

IN THE CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT : SUPERIOR COURT

VS: : JUDICIAL DISTRICT OF LITCHFIELD

MARGUERITE FINDLAY : JANUARY 24, 1986

MOTION TO REARGUE

Pursuant to Practice Book Sections 3111, 3111A, and 3112, the defendant-appellant in the above entitled action respectfully moves this Court for permission to reargue her appeal. The court's decision, State v. Findlay, appears at 198 Conn. 328 (January14, 1986).

The grounds for this motion are set forth in an accompanying Practice Book Section 3098 statement.

MARGUERITE FINDLAY
DEFENDANT-APPELLANT

BY: _____
RICHARD EMANUEL
Her Attorney

O R D E R

After having been presented to the Court, the foregoing Motion is hereby ORDERED: GRANTED / DENIED.

BY THE COURT

_____

CERTIFICATION:

Service certified to all counsel of record on the 24th day of January, 1986.

_____

RICHARD EMANUEL

NO. 11158

IN THE CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT : SUPERIOR COURT

VS: : JUDICIAL DISTRICT OF LITCHFIELD

MARGUERITE FINDLAY : JANUARY 24, 1986

P.B. SECTION 3098 STATEMENT

The defendant-appellant in the above-entitled action has moved to reargue her appeal, pursuant to Practice Book Sections 3111, 3111A, and 3112. This P.B. Section 3098 Statement is submitted in support of that motion.

I. Brief History of the Case

Following a jury trial in the Judicial District of Litchfield, the defendant was convicted of aiding the crime of robbery in the first degree, in violation of Gen. Stat. Sections 53a-134(a)(4) and 53a-8. On November 20, 1981, she was sentenced to a term of imprisonment of seven years.

The defendant appealed, and on January 14, 1986, this Court affirmed her conviction. State v. Findlay, 198 Conn. 328.

II. Specific Facts Relied Upon

The defendant seeks permission to reargue all of the issues raised on appeal.

With respect to the identification issued, defendant respectfully maintains that the trial court's finding that the corporeal viewing of the defendant at the Beacon Falls Town Hall was "unplained"; see 198 Conn. at 337; was simply not supported by the evidence. In fact, the evidence set forth at pp. 35a-38a of defendant's appendix, completely refutes this finding. Without reproducing all of that evidence, it is clear that Mr. Rumovicz was brought to the Town Hall to identify both the car and the defendant:

> Testimony of Robert Rumovicz:
>
> Q. [By Ass't State's Attorney]: What was your purpose of going to Beacon Falls with him [Det. Connor]?

A. [By Mr. Rumovicz]: They told me they had found a car that met the total description and that they had just wanted me to go down and see if I recognized the person.

Q. Okay. Did they say they wanted you to identify a person or a car?

A. A person.

T.2, 59-59)(emphasis added)

It is also not clear from this court's opinion as to exactly what conclusion was reached on the "suggestiveness" issue. At 198 Conn. 337, the opinion states that "[n]either out-of-court identification procedure in this case was unnecessarily suggestive." However, on page 338, it is stated that "we agree with the defendant that the second identification procedure was unnecessarily suggestive." In any event, defendant also contends that the ultimate question of the "reliability" of the identification should be reconsidered.[1]

[1]There is one factual misstatement in this Court's opinion. Mr. Rumovicz described the woman driver of the Dodge as "heavier at the bottom than at the top"; T.2, p. 85; not vice versa as stated at page 332 of the opinion.

With respect to the other claims of error, defendant urges reargument on the basis of the factual and legal grounds advanced in her brief and at oral argument.

III. Legal Grounds Relied Upon

This motion is made pursuant to P.B. Sections 3111, 3111A, and 3112.

MARGUERITE FINDLAY
DEFENDANT-APPELLANT

BY: _____
RICHARD EMANUEL
Her Attorney

CERTIFICATION:

Service certified to all counsel of record on the 24th day of January, 1986.

_____
RICHARD EMANUEL

NO. 11158

STATE OF CONNECTICUT : SUPREME COURT

VS: : STATE OF CONNECTICUT

MARGUERITE FINDLAY : FEBRUARY 10, 1986

O R D E R

THE MOTION OF THE DEFENDANT, FILED JANUARY 24, 1986, TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

O R D E R E D DENIED.

BY THE COURT,

Assistant Clerk-Appellate

NOTICE SENT: 2/10/86

RICHARD EMANUEL
DENNIS SANTORE, S.A.
F. KENT SISTARE, JR., S.A.S.A.
CARL SCHUMAN, A.S.A.
HON. GEORGE D. STOUGHTON
CLERK, SUPERIOR COURT, LITCHFIELD
18-37788
REPORTER OF JUDICIAL DECISIONS

Supreme Court, U.S.
FILED
MAY 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1669

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

MARGUERITE FINDLAY,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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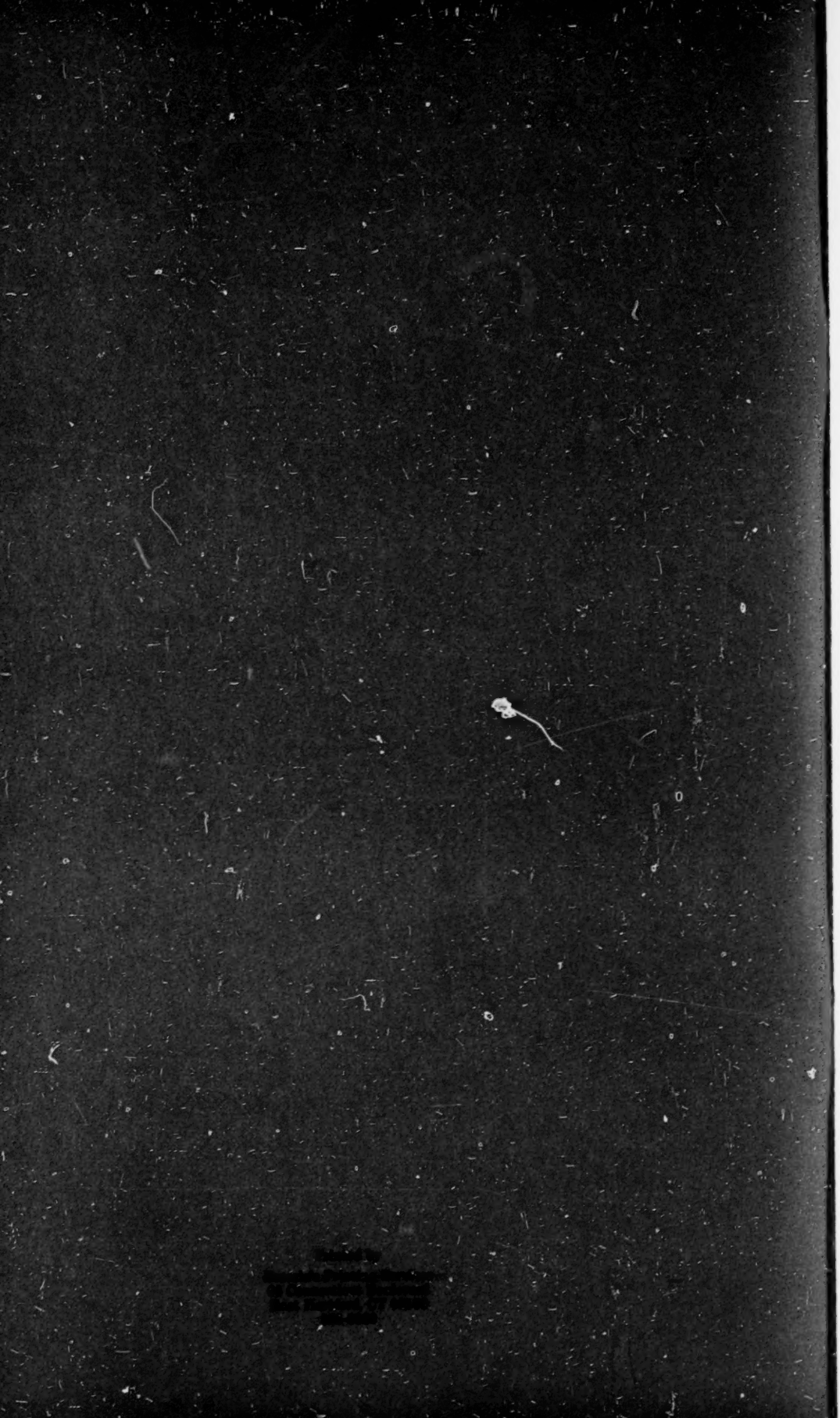

TABLE OF CONTENTS

Reasons for Denial of the Petition . .1

Conclusion 10

TABLE OF AUTHORITIES

Cases	Page
Adams v. South Carolina, 464 U.S. 1023 (1983)	1, 2, 3, 4
Butler v. South Carolina, 459 U.S. 932 (1982)	1, 2, 3, 4
Cupp v. Naughten, 414 U.S. 141 (1973)	7
Dunn v. Perrin, 570 F.2d 21 (1st Cir. 1978)	4
Harlin v. Missouri, 439 U.S. 459 (1979)	6
People v. LaRosa, 112 A.D.2d 954, 492 N.Y.S.2d 633 (1985)	5
Simmons v. State, 206 Miss. 535, 40 So.2d 289 (1949)	5
State v. Boswell, 294 S.E.2d 287 (W. Va. 1982)	6
State v. Derrico, 181 Conn. 151, 434 A.2d 356, cert. denied, 449 U.S. 1064 (1980)	8
State v. Keffer, 281 S.E.2d 495 (W. Va. 1981)	5, 6
State v. Milum, 197 Conn. 602, 500 A.2d 555 (1985)	7
United States v. Johnston, 268 U.S. 220 (1925)	9

REASONS FOR DENIAL OF THE PETITION

1. The petitioner relies heavily on the opinions of two Justices of this Court dissenting from the denial of certiorari in Butler v. South Carolina, 459 U.S. 932 (1982), and Adams v. South Carolina, 464 U.S. 1023 (1983), to support his request that this Court grant certiorari to address the validity of a Connecticut jury instruction informing the jury that a reasonable doubt is one "for which a valid reason can be assigned." While it is significant, of course, that the denial of certiorari in Butler and Adams prompted one and, in Adams, two Justices to write a dissenting opinion on the jury instruction issue, it is certainly more significant that seven Justices decided to deny certiorari in the first place,

especially given the conflict in the courts that the petitioner claims to exist. Butler and Adams, moreover, were capital cases and involved jury instructions significantly different from the one under consideration here. In Butler the trial court had defined reasonable doubt as a "substantial doubt for which an honest person seeking the truth can give a real reason" and as "not a weak or slight doubt, but . . . a serious or strong or substantial well-founded doubt as to the truth of the matters asserted by the state." 459 U.S. at 934 (Marshall, J., dissenting from the denial of certiorari). The instruction in Adams similarly described reasonable doubt as "a substantial doubt arising out of the testimony or lack of testimony in the case for which a person honestly seeking to find the truth can

give a reason" and "not a weak or a slight doubt, but a strong and well-founded doubt as to the truth of the charge." 464 U.S. at 1024 (Marshall, Brennan, JJ., dissenting from the denial of certiorari). In contrast, the instruction in the case at bar is free of any language permitting the state to satisfy its burden of proof merely by eliminating any "substantial," "strong" or "well-founded" doubt. Petition at 7-9. And while the instruction used below did state that a reasonable doubt is one for which a valid reason "can be assigned," it did not personalize the assignment process by suggesting, as did the instructions in Butler and Adams, that the assignment must be done by an "honest person seeking the truth."

2. The jury instructions in most of the lower federal court and state appellate court cases relied upon by the petitioner to support his position on the merits resemble those in Butler and Adams more than the instructions in the case at bar. Thus although a conflict among the courts may exist about the validity of the type of instructions used in Butler and Adams, see Adams v. South Carolina, 464 U.S. at 1026 (Marshall, Brennan, JJ., dissenting from the denial of certiorari), that conflict is simply not relevant here. In many of the decisions from which the petitioner seeks to draw support the jury instructions either defined reasonable doubt in unusually demanding terms, thus arguably lessening the prosecution's burden of proof, see Dunn v. Perrin, 570 F.2d 21,

24 (1st Cir. 1978) (a "strong and abiding conviction"); State v. Keffer, 281 S.E.2d 495, 498 (W. Va. 1981) (a doubt that is "actual and substantial"), or suggested that jurors might individually have to specify and defend the precise nature of this doubt. Simmons v. State, 206 Miss. 535, 40 So.2d 289, 290-91 (1949) ("reasonable doubt must be of the type that you can give a good reason for when you get back in the jury room and discuss the matter, and if you have a doubt in your mind and some fellow juror asks you if you have a doubt, you will be able to give your reasons for having entertained such doubt"); People v. LaRosa, 112 A.D.2d 954, 492 N.Y.S.2d 633, 634 (1985) (jury had to come up with"substantial" and "articulable" reason for its doubts);

State v. Boswell, 294 S.E.2d 287, 295-96 (W. Va. 1982) (reasonable doubt was "one for which he who entertains such doubts should be able to give a good and substantial reason" therefor); State v. Keffer, supra (same).

3. The instructions in the case at bar were undoubtedly correct. The petitioner, in fact, did not object to them at trial. Petition at 9. While that failure does not deprive this Court of jurisdiction since the Connecticut Supreme Court reviewed the instructions on the merits under an exception to its contemporaneous objection rule, Harlin v. Missouri, 439 U.S. 459, 459 (1979); App. to Petition at 18A, the absence of an objection does reveal that at trial the petitioner did not find the instruc-

tions sufficiently offensive to ask the trial court for a corrective instruction or a new trial. See State v. Milum, 197 Conn. 602, 500 A.2d 555, 565 (1985). Viewing the instructions as a whole, as this Court must, Cupp v. Naughten, 414 U.S. 141, 146-47 (1973), the State understands why the petitioner found no fault with the challenged language at trial. The language now isolated by the petitioner formed only part of a sentence that the trial court read in its entirety: "A reasonable doubt [sic] for which a valid reason can be assigned; it is a doubt which is something more than a guess or a surmise." Petition at 8. The trial court then provided several additional sentences that expanded on the notion that a reasonable doubt does not merely mean a

conjecture. Id. Examining the challenged language in the context of the charge as a whole, the Connecticut Supreme Court thus accurately described the instruction as one that "'essentially defined a reasonable doubt as a doubt founded on reason as contrasted with a purely speculative doubt.'" App. to Petition at 19A (quoting State v. Derrico, 181 Conn. 151, 170-71, 434 A.2d 356, cert. denied, 449 U.S. 1064 (1980)). Surely no constitutional error arises from an instruction that defines reasonable doubt by means of this sort of comparison.

4. The petitioner's second claim that the trial court unconstitutionally instructed the jurors that in order to acquit they would have to reconcile the

facts with innocence provides no additional basis for a grant of certiorari. Here again the petitioner did not object at trial, thus again revealing that he did not find the challenged language prejudicial until the jury found him guilty. The petitioner cites no conflict of authority or indeed any authority on the precise issue he frames. Instead the petitioner merely asks this Court to delve into the idiosyncracies of a state trial court's charge to the jury. The petitioner misconceives the nature of the writ of certiorari. This Court does "not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925) (Holmes, J.).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to the Connecticut Supreme Court.

Respectfully submitted.

STATE OF CONNECTICUT
RESPONDENT

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